United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-2634

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2634

JOSE GIL OJEDA-VINALES,
Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

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W/PS

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS.

RESPONDENT'S BRIEF

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Jose Gil Ojeda-Vinales petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on November 21, 1974. That order dismissed the petitioner's appeal from the order of an Immigration Judge finding him deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), as a non-immigrant who had remained longer than authorized. Specifically, Ojeda-Vinales had entered the United States on or about October 24, 1972, as a non-immigrant visitor for pleasure authorized to remain until December 31, 1972, and had remained in the United States beyond that date without authority.

The petitioner conceded the truth of the factual allegations in the Order to Show Cause but refused to concede de-

portability. He contends that the Board's order should be set aside because the deportation proceedings were initiated by an illegal arrest.

Issues Presented

1. Whether petitioner's arrest violated his rights under the Fourth Amendment.

2. Whether, assuming petitioner's arrest to have been in violation of his Fourth Amendment rights and contrary to the provisions of 8 U.S.C. § 1357(a)(1) and (2), such an arrest vitiates an otherwise valid order of the Board of Immigration Appeals requiring petitioner, a concededly deportable alien, to depart from the United States when that order was not based upon any evidence seized at the time of his arrest.

Statement of the Facts

Petitioner's Deportability

The petitioner is a thirty-eight year old married alien, a native and citizen of Paraguay. He was admitted to the United States as a nonimmigrant visitor for pleasure on October 24, 1972 and was authorized to remain in this country until December 31, 1972 (R. 9, 5 at p. 2).* He failed to depart by that date, remained in the United States without authority, and accepted employment in violation of his nonimmigrant status (R. 5).[1]

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* Reference preceded by "R" are to the certified administrative record which has been filed with the Court.

[1] The acceptance of unauthorized employment by a non-immigrant visitor causes him to lose his status and becomes deportable. 8 U.S.C. § 214.1(c); *Londono* v. *Immigration and Naturalization Service*, 433 F.2d 635 (2d Cir. 1970).

Petitioner's Questioning and Arrest

On December 20, 1973 two immigration officers conducted an investigation at the garage in Manhattan where the petitioner was employed. This field investigation was conducted in response to an anonymous complaint received by the New York Office of the Immigration and Naturalization Service ("the Service") that an illegal alien, named Jose, was working as a mechanic at that specific address (R. 5, pp. 9, 10). One officer entered the premises and inquired of the employer whether or not a man fitting the description in the complaint was, in fact, employed at the garage. The owner of the garage stated that a person fitting the description was employed at the garage (R. 5, p. 11). At the investigator's request the garage owner produced the petitioner. The investigator identified himself; inquired of the gentleman produced whether he was "Jose" and further whether he was a tourist (R. 5, pp. 11, 12). Petitioner acknowledged that he was Jose and a tourist and volunteered that he was Paraguayan (R. 5, 11, 12). Following these admissions, petitioner was taken immediately to the New York City District Office of the Service, at 20 West Broadway in Manhattan. At no time did the alien produce any identification indicating the legality of his stay in the United States.

The Deportation Proceedings

The Service instituted deportation proceedings against the petitioner on December 20, 1973 by the issuance of an order to show cause, notice of a hearing and a warrant of arrest (R. 9). At the deportation hearing on January 11, 1974 the petitioner, through his attorney, conceded the factual allegations in the order to show cause, *i.e.*, that he had been admitted to the United States as a nonimmigrant visitor for pleasure until December 31, 1972, and had remained in the United States beyond that date without authority (R. 5). The petitioner contended, however, that

the evidence of the petitioner's deportability was obtained as a result of an illegal arrest and therefore all information obtained by the Service and presented at the deportation proceedings should be suppressed.

The Immigration Judge found the petitioner deportable as charged, and denied the petitioner's motion to suppress the evidence admitted during the deportation hearing. The Immigration Judge granted the petitioner the privilege of voluntary departure, provided that he depart from the United States within 30 days from the date on which the Judge's order became final. An alternative order of deportation was entered in the event the petitioner failed to depart within the period granted for voluntary departure (R. 6).

By Notice of Appeal dated January 11, 1974 the petitioner appealed the order of the Immigration Judge to the Board of Immigration Appeals (the "Board") (R. 4). On November 21, 1974 the Board dismissed the petitioner's appeal and granted the petitioner the privilege of voluntary departure provided that he depart voluntarily within thirty days of the Board's decision (R. 2). The Board further ordered that if the petitioner did not depart from the United States within the time specified for voluntary departure, he would be deported to Paraguay as provided in the Immigration Judge's order.

The Board rejected the petitioner's argument that the arrest had been illegal and that consequently all the facts acquired by virtue of the arrest should have been suppressed. The Board found that the alien's testimony at the deportation proceeding clearly, convincingly, and unequivocally established his deportability, and that such admissions were not obtained as a result of any search and seizure or interrogation during the period of his arrest.

This petition for review was filed on December 17, 1974 and the petitioner's deportation was stayed pursuant to Section 106 of the Act, 8 U.S.C. § 1105(a)(3).

Relevant Statute

Immigration and Nationality Act, Section 287 (8 U.S.C. § 1357):

> Sec. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;
>
> * * * * *

ARGUMENT

The arrest of the petitioner was lawful and does not render the deportation proceeding below *void ab initio*.

The alien argues that his apprehension by immigration officers on December 20, 1973 at his place of employment was an illegal arrest because it was undertaken without a warrant and on the basis of an unreliable informant. Further, he contends that an unlawful arrest requires a vacation of the order of deportation. The alien's position is untenable: First, because the arrest was legal and secondly, because its invalidity would not vitiate an otherwise valid deportation proceeding.

A. The Statutory Authority of Immigration Officers to Interrogate and/or Arrest Aliens who are within the United States in Violation of the Law.

Central to any discussion concerning the arrest of Ojeda-Vinales on December 20, 1973 are the powers conferred upon immigration officers by Section 287(a)(1) and (2) of the Act. Subsection (1) of that statute empowers immigration officers to interrogate, without a warrant, any alien or person believed to be an alien as to his right to be or remain in this country. This statutory authority, and temporary detention accompanying questioning by officials pursuant to Section 287(a)(1), have been repeatedly upheld as a constitutionally permissible power to enforce the provisions of the Immigration and Nationality Act. *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau and Tit Tit Wong* v. *Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F.2d 683 (D.C. Cir.), *cert. denied*, 386 U.S. 877 (1969). The Courts have often declared that the officers

in the normal course of their duties may approach and question persons as to possible violations, even though they have insufficient grounds for arrest. Thus the arrests that follow can be lawful. *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968); *Yam Sang Kwai* v. *Immigration and Naturalization Service, supra* at 686, 687; *Au Yi Lau* and *Tit Tit Wong* v. *Immigration and Naturalization Service, supra* at 222.

In addition to the interrogation powers referred to above, Section 287(a)(2) of the Act empowers an immigration officer, without a warrant,

> To arrest any alien in the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

That subsection of the statute thus requires the joinder of two elements to justify an arrest without a warrant: (1) reason to believe that the alien is in the United States in violation of law or regulation; (2) reason to believe that the arrested alien is likely to escape before an arrest warrant can be obtained. The "reason to believe", standard referred to in this statute perhaps can be substantially equated with "probable cause" which traditionally underlies criminal arrests.

B. Petitioner's interrogation and arrest were lawful

It is submitted that the information received by the Service from the anonymous complainant provided the Service with a sufficient basis upon which to conduct a field investigation pursuant to Section 287(a)(1) of the Act. *Yam Sang Kwai* v. *Immigration and Naturalization Service,*

411 F.2d 683 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 877 (1970). In this respect the record reflects that the Service received information that an illegal alien, named Jose, was employed at a specific garage and address in the city. It is clear that the officers' purpose in going to that garage was merely to inquire. This inquiry proceeded in an orderly manner without disruption of business or needless infringement upon the rights of those persons at the garage.

The record also reflects that upon arrival at the garage one officer remained outside and one officer proceeded into the premises to consult with the employer. Upon finding the employer or manager, the officer asked if, in fact, a person by the name of Jose was employed as a mechanic by the garage. The employer answered affirmatively, and consented to the officers' request to speak to that employee. At that point the informant's information had been substantially corroborated. It is submitted that the officer had more than a sufficient basis to conduct further inquiry pursuant to Section 287(a)(1) of the Act. *Au Yi Lau* and *Tit Tit Wong* v. *United States Immigration and Naturalization Service, supra* at 223.

Testimony at the deportation hearing further shows that the employer brought Ojeda-Vinales into the office whereupon the officer immediately identified himself, in both English and Spanish. The officer again, pursuant to Section 287(a)(1), engaged the alien in an extremely limited line of questioning within his lawful statutory authority. The officer asked Ojeda-Vinales if he was a tourist. In response the alien stated he was a tourist and that he was from Paraguay.[2]

Upon receiving his answer the officer had reason to believe that Ojeda-Vinales was an alien who was in the

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[2] No further questions were asked until the alien was informed of his rights upon arrival at the Service Office, 8 C.F.R. § 287.3.

United States in violation of the law and regulations. The officer had confirmed the complainant's tip and further had received a voluntary admission from the alien that he had entered the United States on a tourist visa. It was also obvious that Ojeda-Vinales was employed in the United States in violation of the specific terms of his tourist visa.[3] Therefore the first element of a warrantless arrest pursuant to Section 287(a)(2) was satisfied.

The second element of a warrantless arrest pursuant to Section 287(a)(2) was satisfied as well because the immigration officer had more than ample reason to believe Ojeda-Vinales would flee before an arrest warrant could be issued. Having identified himself as an immigration officer and inquired of the alien's right to be in this country only a foolhardy officer would have left the premises to obtain a warrant with any rational expectation that Ojeda-Vinales would await the officer's return. In a metropolis as large as New York City this alien could have easily left the garage and disappeared with confidence that he would not be apprehended by the Service. Effective enforcement of the immigration laws manifestly required that the officers place Ojeda-Vinales in custody immediately. Therefore the officer properly requested the alien to accompany him to the Service Office as directed by 8 C.F.R. § 287.3.

In conclusion, both requisite elements for a warrantless arrest having been satisfied, we submit that Ojeda-Vinales was properly arrested by the immigration officers under their lawful authority pursuant to Section 287(a)(2) of the Act.

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[3] The acceptance of unauthorized employment by a non-immigrant visitor causes him to lose his status and become deportable, 8 C.F.R. § 214.1(c). *Londono* v. *Immigration and Naturalization Service,* 433 F.2d 635 (2d Cir. 1970).

C. The deportation order is supported by clear, unequivocal, and convincing evidence untainted by any illegal arrest.

Even assuming, *arguendo*, that the arrest was illegal the petitioner would not be entitled to the termination of his deportation. The petitioner's argument would have validity only if it were established that the evidence underlying the deportation order resulted from the improprieties of his arrest. It is well settled that irregularities in the arrest do not vitiate the deportation order if that order was properly substantiated. This general rule has long been recognized by the Supreme Court, and has been repeatedly upheld in cases involving deportation proceedings. *Frisbie* v. *Collins*, 342 U.S. 519 (1952); *Bilokumsky* v. *Tod*, 263 U.S. 149 (1923); *Ker* v. *Illinois*, 119 U.S. 436 (1886); *LaFranca* v. *Immigration and Naturalization Service*, 413 F.2d 686 (2d Cir. 1969); *Guzman-Flores* v. *Immigration and Naturalization Service*, 496 F.2d 1245 (7th Cir. 1974); *Shu Fuk Cheung* v. *Immigration and Naturalization Service*, 476 F.2d 1180 (8th Cir. 1973); *Vlissidis* v. *Anadell*, 262 F.2d 398 (7th Cir. 1959).

> In *Vlissidis* v. *Anadell*, *supra*, at 400, the court observed: Evidence obtained as the result of an unlawful arrest may be suppressed, but we know of no authority for holding a deportation proceeding such as we are here considering to thus become null and void.

and in *Klissas* v. *Immigration and Naturalization Service*, 361 F.2d 529 (D.C. Cir. 1966) the court specifically held, in the face of a challenge comparable to that in the instant case, that the deportation order was adequately supported by untainted evidence. Even if an arrest was illegal, the mere fact that the authorities got the "body" of an alien illegally would not make the proceeding to deport him the fruit of the poisonous tree. This would not be the case when evidence seized as the result of an illegal arrest was sought to be used in a proceeding. *Huerta-Cabrera* v.

Immigration and Naturalization Service, 466 F.2d 759, 761 (7th Cir. 1972).[4]

If the rule were otherwise, aliens in the petitioner's position could permanently immunize themselves from deportation by showing that their initial apprehension by an immigration officer was defective. *Arbiol* v. *Immigration and Naturalization Service*, 73 Civ. 344 (March 6, 1973) (Frankel, *J.*). No such absurd result is required or contemplated by the Act or the Constitution.

The petitioner was found deportable as an alien who had been admitted as a nonimmigrant visitor for pleasure who remained in the United States beyond the terms of his visa. At the deportation hearing before an Immigration Judge the petitioner voluntarily conceded the factual allegations contained in the Order to Show Cause of December 20, 1973, *i.e.*, that he was admitted solely as a nonimmigrant for pleasure authorized to remain in the United States until December 31, 1972, and that he remained beyond that date without authority. Thus the order for the petitioner's deportation resulted from his own admissions at the deportation hearing and while he was represented by counsel. Compare, *Klissas* v. *Immigration and Naturalization Service*, 361 F.2d 529 (D.C. Cir. 1966). Accordingly, as this Court

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[4] Opposing counsel's brief erroneously relies on *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), to support his contention that the arrest in the instant case was illegal and therefore the deportation proceedings should be rendered void *ab initio*. It should be noted that *Almeida-Sanchez* considered the reasonableness of an automobile search pursuant to Section 287(a)(3), 8 U.S.C. 1357(a)(3). Furthermore, the sole contention on appeal was that the marihuana which was uncovered during the unconstitutional search should not have been admitted as evidence against him in the criminal proceedings. As noted *infra*, the finding of deportability in this case did not rely on any evidence arising from this arrest. Furthermore, we submit that the arrest in the instant case was in total conformity with the constitutional protections recently discussed in *United States* v. *Brignoni-Ponce*, No. 74-114 (U.S. June 30, 1975).

stated in *LaFranca* v. *Immigration and Naturalization Service, supra,* at 689:

> ". . . [petitioner's] deportability was conceded at the hearing. The Immigration and Naturalization Service did not rely upon any statement taken or evidence seized at the time of his arrest. Under these circumstances, even if the arrest without a warrant were illegal this would not invalidate the subsequent deportation proceedings."

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA # 74-2634

WALTER G BRANNON being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 10th day of July 1975 he served a copy of the within

RESPONDENTS BRIEF

by placing the same in a properly postpaid franked envelope addressed: TO

OLTARSH FLATTERY & OLTARSH
225 BROADWAY
NEW YORK, N.Y. 10007

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Walter G Brannon

Sworn to before me this
10 day of July 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977